No. 11,821

IN THE

United States Court of Appeals

For the Ninth Circuit

su vol. 2511

DAWSON COUNTY, MONTANA,
Appellant,

vs.

MARY HAGAN, E. B. CLARK and MINNIE R. EVANS, on their own behalf and on behalf of all bondholders of the Upper Glendive-Fallon Irrigation District of the State of Montana, and UNITED STATES OF AMERICA,
Appellees,

and

MARY HAGAN, E. B. CLARK and MINNIE R. EVANS, on their own behalf and on behalf of all bondholders of the Upper Glendive-Fallon Irrigation District of the State of Montana,
Appellants.

vs.

EDNA YALE, ALLEN W. YALE and RUBY YALE (his wife), and RUTH PETTERSON and HANS PETTERSON (her husband), THE SCOTTISH AMERICAN MORTGAGE COMPANY, LIMITED, UNITED STATES OF AMERICA, DAWSON COUNTY and PRAIRIE COUNTY,
Appellees.

Upon Appeals from the District Court of the United States for the District of Montana.

BRIEF FOR APPELLANTS.

(Second Appeal)

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Appellees.

Upon Appeals from the District Court of the United States for the District of Montana.

BRIEF FOR APPELLANTS.

(Second Appeal)

OPINION BELOW.

This appeal is from the judgment entered by the District Court on November 24, 1948, pursuant to findings of fact made and conclusions of law stated by direction of this Court in its *per curiam* opinion filed November 1, 1948.

Judgment was in favor of the bondholders as to distribution of the funds in the registry of the Court being an award of just compensation in a condemnation action.

JURISDICTION.

Jurisdiction of the District Court rests in the general condemnation act of August 1, 1888, 25 *Stat.* 357, 40 *U. S. Code,* Section 257, and the act of October 14, 1940, 54 *Stat.* 1119, and Sections 1331 and 1345, Title 28, *U. S. Code.*

The jurisdiction of this Court rests on Section 1291, Title 28, *U. S. Code.*

QUESTION PRESENTED.

These appeals are taken by adverse claimants to the funds deposited in the registry of the Court in a condemnation proceeding wherein a declaration of taking was filed on April 27, 1942, the amount deposited as just compensation is not being contested in this action.

Notice of appeal by Dawson County, Montana, and Prairie County, Montana, were filed December 10,

1948. Cross appeals by bondholders were filed on December 27, 1948.

The question before the Court was whether the bondholders had a lien upon the lands at the time of the filing of the declaration of taking on April 27, 1942. Title to said lands having passed to the counties by tax deeds taken in 1931 and 1939.

The disposition of the compensation deposited in the registry of the Court was the sole question for decision herein involving questions of law only.

Partial distribution to the counties was made on July 11, 1944, of the amount of the general taxes against said lands at the time of taking the tax deeds. The matter of the further distribution of the remaining funds was reserved by the Court. (Transcript pages 67 and 68.)

The special assessments made against the lands involved were challenged by the counties. (Appellants' Brief page 12.)

STATEMENT OF THE CASE.

We supplement the statement of the case, pages 1 to 4 inclusive in appellants' brief on file herein, with the following:

Under Montana law, a tax deed creates a doubtful title and the present action was brought by the United States to quiet title. (Transcript page 104.) The value of the lands to be condemned was agreed upon by the appellant counties and the United States. No appearance challenging the action was made by the appel-

lants as they appeared only for the purpose of distribution of the compensation agreed upon deposited in the registry of the Court when the action was commenced. (Transcript pages 98, 99, 101, 104 and 105.)

The counties and the United States agreed upon condemnation as the best procedure to quiet title to obtain immediate possession in the United States by reason of the provisions of Section 258-A Title 40, *United States Code Annotated* under which the fee title to the lands vests in the United States upon the filing of the declaration of taking and the deposit of the funds determined to be just compensation.

Under Montana law any decree to quiet title to the lands brought in the State Courts where service of summons by publication process is necessary by reason of the non-residence of the defendants, would not become final until one year after the entry of the decree of such Court under the provisions of Section 9187 *Revised Codes of Montana 1935,* and the decisions of the Supreme Court of Montana construing said section. The complaint shows the United States required the immediate possession of the lands. (Transcript pages 25 and 26, Paragraph VIII.)

SPECIFICATION OF ERRORS.

Appellant intends to rely on this appeal on the contentions that the District Court of the United States for the District of Montana, being the trial Court below, erred:

1. In adopting as its rule in making distribution of the funds in the registry of the Court the *dictum* of the Montana Supreme Court in a decision wherein the method of distribution of funds derived from the sale of tax deed lands was not before said Court for decision.

2. In finding overpayments to appellants of taxes due them where the contract between the United States and appellants fixed the acreage to be sold to the United States by appellants and the purchase price was agreed upon in a lump sum with no division into tracts.

3. In the judgment entered distribution is made to appellees who have no lien on the tax deed lands and no right to the funds, said order being in fact a collateral attack on the tax titles of appellants not permissable under Montana law.

4. In its interpretation of Chapter 63, Laws of Montana, 1937 which has no application to this cause as no taxes were levied after the tax deeds were taken by appellants and such act has been determined by the Supreme Court of Montana to be prospective and not retroactive.

5. In failing to give proper consideration to the stipulation between the United States and these appellants which fixed by agreement the lands to be taken and the price to be paid by the United States, which becomes binding upon both parties in a condemnation action.

6. In ordering judgment against the United States with interest from July 11, 1944 in favor of the appellee bondholders the records showing the value of the lands taken by the United States was fixed by agreement with the owners, the appellants herein such judgment and interest thereon being void.

7. The judgment entered herein is contrary to the admissions of the parties by their pleadings in that Paragraph III of defendant, Dawson County's answer was not denied by reply and therefore the facts therein set forth cannot now be challenged by the appellees. (Transcript pages 49-50.)

8. The award to the appellee bondholders by the judgment herein is contrary to the decisions of the Supreme Court of Montana wherein they are classified the same as any mortgagee investor with no greater rights and the same obligations as to payment of taxes to protect the lien of their investment.

9. Conclusion of law #1 adopted by the Court is contrary to the statute law of Montana, and the decisions of its Supreme Court thereon and creates a precedent unwarranted under such statutes and decisions in distributing the remainder of the compensation deposited in the Court to bondholders who had no lien on the fund having lost all claim of lien to the lands taken by the tax deeds. Such conclusions should not be adopted by this Court as it would in effect require all counties in Montana to divide the sale price of tax deed lands to all persons who held liens on the lands sold prior to the tax deed proceedings.

SUMMARY OF ARGUMENT.

(a) The distribution ordered in the judgment entered awarding the remaining funds in the registry of the Court to the bondholders was based upon *dicta* in a decision of the Supreme Court of Montana in a case where the Court suggested a method of disposition of the funds derived from the sale of the tax deed lands by the county. The Court itself stated the matter was not then before it for decision, and the case is not authority for the conclusions adopted by the trial Court in its judgment.

(b) The judgment entered awarding the funds to the bondholders representing just compensation is a collateral attack on the tax title to these lands owned by the counties and sold to the United States. Such an attack is contrary to the decisions of the Supreme Court of Montana relating to tax deed titles.

(c) The United States and the counties stipulated on the value of the tax deed lands purchased by agreement between them in which the acreage was fixed and no division of such acreage was made by the parties into tracts. Such agreement and stipulation is binding upon both parties.

(d) The bondholders invested in lands subject to general taxation and in order to protect such investment were by law obligated to see that the general taxes levied in each year were paid or the lands redeemed from the tax sale or the bondholders could purchase the outstanding tax sale certificate and take tax title to the lands.

(e) Under Montana law the tax title of the counties was an independent grant from the sovereign and the lands were free from all prior liens and encumbrances including prior tax liens.

(f) No irrigation assessments were made after the tax deeds were taken so that Chapter 63 of the Laws of Montana, 1937, has no application in this action. The act being prospective and not retroactive.

(g) The equity rule followed by the Court below does not apply in this case as the award of just compensation is payable only to the owner of the land. The same being free and clear of all encumbrances and liens by the taking of the tax deeds, under Montana law and decisions.

(h) The judgment entered herein sets a precedent on a point of fundamental law not passed upon by the Supreme Court in its decisions or enacted by Montana Statute Law. The award to bondholders of part of the sale price of the lands taken by the United States of America where they had no lien on the lands under Montana law, if followed by this Court, would require the distribution of a part of the sale price of tax deed lands sold by the counties to be paid to all holders of liens of record prior to the tax deeds which is contrary to express holdings of the Supreme Court of Montana.

(i) Appellant, Dawson County, Montana in Paragraph 3 of its answer set forth its claim and title to the purchase price of the land sold by it to the United States. Further pleading no person whom-

soever had any right, thereto, and its title was free from all liens or encumbrances and claimed the right to the distribution of the just compensation for said lands. None of these allegations were denied by reply and they now stand admitted in this proceeding and entitle said appellant to the funds remaining in the Registry of the Court applicable to said lands of said County taken by the United States.

ARGUMENT.

We shall follow our specification of errors in the order of presenting our argument in this cause.

We first call attention to the case (Transcript page 152) relied upon by the bondholders and adopted by the Court in its findings. *State v. Board of Commissioners of Cascade County,* 89 Montana 37, (1931) 296 Pacific 1. At the outset we call attention to the statement of our Supreme Court on points 17 and 19 thereof as follows:

> "The decision of a court in any case should be read in the light of the precise question then under consideration. *Cohens v. Virginia,* 6 Wheat. 264, 5 L. Ed. 257. This court, speaking through Mr. Chief Justice Callaway, in the case of *State ex rel. Walker v. Jones,* 80 Mont. 574, 261 P. 356, 360, 60 A. L. R. 551, said: 'It is the rule of universal application that general expressions used in a court's opinion are to be taken in connection with the case under consideration'—citing Bramwell v. United States F. & G. Co., 269 U. S. 483, 46 S. Ct. 176, 70 L. Ed. 368. And again, in

> the case of Sun River Stock & Land Co. v. Montana Trust & Savings Bank, 81 Mont. 222, 262 P. 1039, 1047, this court said: 'In considering the meaning and intent of the language of an opinion one must have constantly in mind the facts of the case in which the opinion is written. For, as Chief Justice Marshall observed, it is impossible so to use language as that general expressions apply in every instance with the same meaning to every condition of facts'—citing Chater v. San Francisco Sugar Refining Co., 19 Cal. 220."

This case was followed in *Edquest v. Tripp and Dragstedt, et al.,* 93 Montana 446 (1933).

In the case above quoted the Montana Supreme Court had before it for decision this question only whether or not the lien of irrigation district bonds is a general obligation of the irrigation district or merely a charge against the lands within the district and the holding in that case reversed the former decisions of the Supreme Court in the case of *Cosman v. Chestnut Valley Irrigation District,* 74 Montana 111, 239 Pacific 879, 40 A. L. R. 1344 (1925).

After determining the matter at issue, the Court went on to say at page 95, Volume 89, *Montana Reports*:

> "It has been suggested by counsel for respondents that the county hold title to these lands as a trustee. While this matter is not directly before the court for determination, yet we observe in connection therewith that, when the county acquires these lands by tax deed on account of de-

> linquent taxes and irrigation district assessments, it takes and holds such title as a trustee. The moneys derived from the sale of such lands are trust funds. The parties and entities interested in that fund are the school districts within the county, the county itself, the state to the extent of the taxes owing to it, the bondholders, and the holders of the debenture certificates."

The statement of the Court above set forth shows clearly what can happen in a case where the Court endeavors to express its views on matters not before it for decision. In connection with this statement above referred to this Court in the case of *Judith Basin Irrigation District v. Malott,* 73 Fed. 2nd 142, (1934) 97 A. L. R. 508, made the following pertinent statement:

> "The Supreme Court of Montana in *State ex rel. Malott v. Board of County Commissioners,* 89 Montana 37, 296 Pacific 1, expressly overruled its previous decisions and decided irrigation district bonds were not the general obligation of the district, but merely a charge against the lands within the district, and that each tract of land was only liable for its proportion of the entire bonded indebtedness. It was also held in that case that when the land had been sold for taxes and when conveyed to the county by tax deed and subsequently sold by the county, as provided by law, that the purchaser acquired the lands free and clear from any lien of the bonds or any future taxation for the payment thereof."

Citing Section 7232 of the *Rev. Codes of Montana,* as to the duty to assess the tax annually for the pay-

ment of the bonds and at page 514, in 97 A. L. R. point #8, "we also suggested that the question of the disposition of the funds derived by the sale of the lands deeded to the county for the State, county and irrigation district taxes suggested by the Supreme Court of Montana in its dictum in the case of *State ex rel. Malott v. Board of County Commissioners,* supra, was in conflict with the statutory rule *Revised Code of Montana, 1921,* Section 2235 Subdivision 1, as amended by laws of 1927, Chapter 85, Section 3, in relation thereto.

In the case above quoted, the same question was before this Court, as was before the Supreme Court of Montana in the case known as the *Malott* case, 296 Pacific 1, 89 Montana 37. Subsequent to this decision, which was never appealed to the Supreme Court of the United States for final decision, the United States Supreme Court in the case of *Erie Railroad Company v. Tompkins,* 114 A. L. R. 1457 (1938), held contrary to this Court's decision in the *Judith Basin v. Malott* case above referred to, the holding being:

> "The phrase, 'laws of the several states,' as used in statute requiring federal courts to apply laws of the several states except in matters governed by federal Constitution or statutes *held* to include not only state statutory law, but also state decisions on questions of general law, in absence of any constitutional provision purporting to confer upon federal courts power of declaring substantive rules of common law applicable in a state."

This doctrine is followed in the Montana case of *Toole County Irrigation District v. Moody,* 125 Fed-

eral 2nd 498 (1942) from which we quote the following specific holdings made by the Court, none of which support the findings of the district Court in its conclusion of law #1 wherein this decision is quoted as supporting such conclusions. The holdings of the Court in said case, are as follows:

1. "Recovery could not be had against district in action on irrigation district bonds on ground that bonds even if not accrual obligations of district when issued had become so by reason of a subsequent agreement, where action was not based upon the agreement and agreement in so far as it purported to make the bonds general obligations of district was void."

2. "The doctrine that a Federal Court must follow decisions of the highest Court of a state is as applicable to actions founded on contract as to tort actions."

3. "The Federal Courts in determining whether bonds issued by Montana irrigation district were general obligations of the district were required to follow decisions that such bonds issued pursuant to Montana statutes were not general obligations of irrigation district, but merely a charge against land within the district." *Revised Codes of Montana 1921,* Sections 7208, 7210, 7213, 7226, 7229, 7231 and 7232.

4. Judicial Decisions.

"The act of Circuit Court of Appeals in action on Montana Irrigation District bonds in giving effect to Montana decisions that bonds did not constitute general obligations of irrigation district, did not constitute 'an impairment of obligation of contract' since the Courts' decision

was merely that the obligation allegedly impaired did not exist." Revised Codes of Montana, Section 7210.

This Court should not adopt the doctrine of the Supreme Court in the *Malott* case herein before cited, as to such doctrine the Montana Courts have held:

1. In the case of the *Empire Theatre Company v. Cloke et al.,* 53 Montana 183, 163 Pacific 107. (1917.) "An *obiter dictum* is a gratuitous opinion, an individual impertinence which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it."

2. *Mettler v. Ames Realty Co.,* 61, Montana 152, 201 Pacific 702. (1921.) "Observations made during the course of an opinion upon a subject not involved in the case do not require explanation and are not binding upon the Court." At page 165 the Court says, "The language of Honorable Simeon E. Baldwin is particularly pertinent here: 'If the writer of a judicial opinion has permitted his pen to move too fast and gone beyond the exigencies of the case, it is the strength of our system of remedial justice that his words lose their authority, as soon as the bounds of necessity are passed.' " (Citing 18 Yale Law Journal pages 1-8 inclusive.)

3. "All that is necessary to make a decision of this Court authoritative is that there shall appear to have been an application of the judicial mind to the precise question adjudged and that the point was fully considered." *Spratt v. Helena Power Transmission Company,* 37 Montana 60, 94 Pacific 631. (1908.)

4. We quote from 14 Am. Jur. 295, Section 83, "The doctrine of *stare decisis* contemplates only such points as are actually involved and determined in a case, and not what is said by the Court or judge outside the record or on points not necessarily concerned therein. Such expressions being obiter dicta do not become precedents." Citing *State ex rel. Walkel v. Jones,* 80 Montana 574, 261 Pacific 356, 60 A. L. R. 551. (1927.)

5. In the case of *Hawks v. Hamill* (1933), 288 U. S. 52, 77 L. Ed 610, 53 Supreme Court 240, Justice Cardozo observed: "An opinion may be so framed that there is doubt whether the part it invoked as an authority is to be ranked as a definitive holding or merely a considered dictum. But the result will not be changed though the definition of perpetuities be something less than a decision. At least it is a considered dictum, and not comment merely obiter. It has capacity, though it be less than a decision, to tilt the balanced mind toward submission and agreement.

In controversies so purely local, little gain is to be derived from drawing nice distinctions between dicta and decisions. Disagreement with either, even though permissible is at best a last resort, to be embraced with caution and reluctance. The stranger from afar, unacquainted with the local ways, permits himself to be guided by the best evidence available, the directions or the counsel of those who dwell upon the spot." See also quoting with approval *Blue Valley Creamery Co. v. Consolidated Products Co.,* 1936, CCA 8th 81 Fed. 2nd, 182.

6. The Court in *Carroll v. Carroll,* 1853, 16 How U. S. 275, 14 L. Ed 936 held that the duty of the Federal Courts to follow state court decisions extends only as far as the rules of *stare decisis* permit, and since dicta i.e. expressions not necessary to the actual decision of the controversy before the Court have no value as binding precedents in common law Courts, a Federal Court is not required to follow dictum in a State Court decision.

The *Malott* case was not followed by any other case reported as to the trustee doctrine where the county acquires title to lands through tax deeds. It was, however, mentioned in other cases such as *River Farms of California v. Gibson, County Treasurer,* 42 Pacific 2nd 95 (1935). By statute, the county treasurer was creating a trustee of the irrigation district funds as well as for sale and for redemption of the lands from tax liens. The case cites with approval the doctrine of the Supreme Court of Montana in the *Malott* case but an examination of the facts and matter for decision before the California Court and *Malott* case facts and the doctrine set forth therein are entirely different.

In the Utah case, *State v. Salt Lake County,* 85 Pacific 2nd 858 (1938), the Utah Court refused to follow the doctrine of the *Malott* case in the following language:

> "Court decisions are authoritative only upon questions of law or facts actually presented, discussed and decided."

In a subsequent decision of the Supreme Court of Montana, *State ex rel. Malott v. Cascade County,* 22

Pacific 2nd 811, 94 Montana 394 (1933), in which the sole question was the right of the county treasurer to assign tax certificates of sale to a private person who purchased to take tax title to the land and wipe out the lien of irrigation district bonds. The Court held this could not be done, and in its decision cited the *Malott* case 89 Montana 37, 296 Pacific 1, with approval, but in its decision it referred to *debenture certificates* which in this particular case had been issued by the county to the irrigation district. In this case now before this Court there were no *debenture certificates* involved. The decision above referred to specifically holds:

> "If the land would sell for an amount in *excess of the taxes and assessments* * * *"

This, of course, was impossible in the instant case. The compensation deposited for the Dawson County lands being $23,526.00, and for the Prairie County lands, $7680.00, which were the amounts for which the counties agreed to sell the lands to the United States. Unpaid irrigation assessments totalled $41,662.98, so that the case is not authority for the trustee doctrine. The statement made pertaining to the irrigation district assessments was not before the Court for decision.

OVERPAYMENT.

We contend there could be no overpayment as to the counties as they sold specific acreages of land for a gross sum of money. No changes or alteration of the

original contract was made at any time by any of the parties. This action was brought and completed to quiet title to the lands as a means of giving the United States a complete and immediate title and possession under the provisions of the Federal Code. The fee was vested in the United States upon the filing of the declaration of taking, the method of payment adopted was by agreement. The condemnation action and award followed the original agreement.

The legal procedure of condemnation was used as a means of determining to whom payment should be made, as well as giving the United States superior rights to the land that could not be obtained under State law as any judgment in a Montana action to quiet title where defendants are served by public process does not become final until one year after the entry of the decree under the provisions of Section 9187 *Revised Codes of Montana 1935.*

The bringing of an action to condemn merely for the purpose of quieting title would not alter or change the original agreement of the parties so that the division of the lands into tracts was merely for the convenience of the agencies of the United States who took possession of the land and used it for their purposes. *Bank of Edenton v. United States,* 4th Circuit, 152 Fed. (2d) 251-4, *Danforth v. United States,* 308 U. S. 271-282, *Oliver v. United States,* 156 Fed. (2d) 281-282.

> In the *Danforth* case above cited, "An offer by United States officer to purchase perpetual flowage easement over land for specified amount, in

connection with flood control program, mentioning desire to consummate the purchase by friendly condemnation proceedings, was, when accepted, an agreement to fix the price of the easement at the named figure, and was binding in subsequent condemnation proceeding, notwithstanding attempt of the government to withdraw the offer after acceptance."

The lower Court in its decision and order on September 4, 1947, pages 98 and 99 of the Transcript on Appeal makes this statement:

"The lands embraced in this action were acquired by the Government through an agreement which included total acreage of the purchase and consideration therefor, and also through condemnation proceedings, wherein declaration of taking was filed, (sec. 258a, Title 40, U. S. C. A.), and commissioners were appointed by the court to appraise the lands, which was done in accordance with the terms of the aforesaid agreement of purchase; and thereafter they made their return and awarded as just compensation for the same total acreage the same amount of money as had theretofore been agreed upon between the Government and the defendants herein, Dawson and Prairie Counties, which sum was thereafter deposited in the registry of the court. Final judgment was entered on the awards of the commissioners, and no appeal was ever taken therefrom."

Our contention is that the counties, after the signing of options to the Government, and stipulating with the Government for the purchase price of the acre-

age to be taken were in no position to file in the condemnation action any pleading making changes nor in any way abrogating the contract and agreements made, nor can they seek to have the commissioners appointed appraise the land at any greater value by means of appraising tracts where the total value would exceed the agreed price between the United States and the counties. There could and has been no division of the consideration for the acreage sold.

Conclusion No. 5 of the Court is erroneous in ordering repayment (Tr. 153-154), citing in support of such conclusion the case of *United States v. Miller,* 317 U. S. 369, 63 Supreme Court 276, 87 L. Ed. 336, 147 A. L. R. 55 (1943). A close examination of this case shows that there is a very distinct difference of facts in that case and the instant case. In the *Miller* case the Court paid to three respondents upon their application when the action was filed the sum of $850.00 each as just compensation. The case proceeded to trial and the jury fixed the awards assessing them at a less sum than the sum awarded and paid by the Court. Repayment was ordered by the Supreme Court in the case. Here compensation was fixed on all of the lands sold by the counties to the United States by agreement. There was no trial. The commissioners awarded the sum agreed upon. The division into tracts was made by the agents of the United States. (Transcript pages 103 and 104.)

COLLATERAL ATTACK.

Under our Court decisions after the taking of lands by tax deed, all liens and encumbances have been extinguished, including prior tax liens. The bondholders are in such a position now and since the counties obtained the lands by tax title no attack can be made except by direct action. Here the Court's order of distribution is a collateral attack on the tax title as an attempt is made to give part of the just compensation agreed upon and deposited in the registry of the Court to appellees who had no lien on the lands or from the funds deposited.

On collateral attack our Court has said in *Richardson v. Lloyd et al.,* 90 Montana 127, 300 Pacific 254 (1931), quoting from page 132, Montana Reports:

> "A tax deed operates to divest the original owner of his title to the land. (Sec. 2215, Rev. Codes 1921.) Though subsequent in time, it is paramount in right over the title of the mortgagors, and extinguishes all former titles. (State ex rel. City of Great Falls v. Jeffries, 83 Mont. 111, 270 Pacific 638.)
>
> The general rule is that a tax title cannot be assailed collaterally, but must be attacked, if at all, in a direct action. (37 Cyc. 1490, note 84; 4 Cooley on Taxation, 4th ed., sec. 1408; West v. Negrotto, 52 La. Ann. 381, 27 South. 75; State Mortgage Corp. v. Traylor, (Tex. Civ. App.) 32 S. W. (2d) 887.)"

In the case of *Smith v. Whitney,* 105 Montana 523, 74 Pac. 2d 450 (1937), our Court makes this statement:

> "No person may question the validity of a tax sale or deed unless he can first show that he, or those under whom he claims had some title to the property at the time of the sale."

Citing 26 RCL 446, *Goldsbury v. MacConnell,* 73 Colo. 35, 215 Pac. 872, *Hopper v. Chandler,* 183 Ark. 469, 36 S. W. 2d 398.

ASSESSMENTS AFTER TAX DEED.

No assessments for the irrigation district were made after 1938, hence no right to further assess the lands could be made under Chapter 63 Laws of 1937, as this act was passed to protect future districts to be created. After the law was passed, it had no application to the irrigation district created before its enactment. The title here passed to the United States, April 27, 1942. No further assessments were possible under the express provisions of this statute, 40 USCA 258a.

The Montana Supreme Court has construed Chapter 65 Laws of 1937 in the case of *State ex rel. Osten v. Billings,* 91 Montana 76, 5 Pac. 2d 562 (1931), from which we quote on page 81:

> "The validity and effect of the tax deed is to be determined by the statutes in force when the sale was made and not by statutes subsequently enacted, for, except as to governmental agencies, the sale of land for delinquent taxes constitutes a contract between the purchaser and the state, the obligation of which cannot be impaired to the disadvantage of the purchaser by subsequent leg-

islation. (37 Cyc. 1452; 26 RCL 434; Prowant v. Smith, 77 Okl. 257, 188 Pac. 93; Walker v. Ferguson, 176 Ark. 625, 3 S. W. 2d 694.)"

" 'The right of property acquired by the purchaser at this sale, and the right of redemption remaining to the owner, must both be governed by the law in force at the time of sale. Neither, in our judgment, could be either abridged or enlarged by subsequent legislation. This is unquestionably so as to the right of the purchaser.' (Merrill v. Dearing, 32 Minn. 479, 21 N. W. 721; and see Johnson v. Taylor, 150 Cal. 201, 119 Am. St. Rep. 181, 10 LRA (n. s.) 818, 88 Pac. 903.)"

We further quote from the holding of our Court in the title, page 82 as follows:

"We hold that one who purchases a certificate of sale from the county occupies the same position legally as if he had purchased at the sale, provided that at the time he takes an assignment of the certificate of sale from the county the law remains the same as it was when the sale was made. A contractual relation came into being when Corkins, Jones' predecessor in interest, purchased the certificate of sale from the county. Jones acquired every right Corkins had. Jones therefore became entitled to all the benefits flowing from the certificate under the law existing when the county's title thereto was acquired by Corkins. (State ex rel. Davenport v. McDonald, 26 Minn. 145, 1 N. W. 832; State ex rel. Stieff v. Bradshaw, 39 Fla. 137, 22 South. 296.) We do not overlook the fact that the purchaser obtains only the rights of the county, nor do we overlook the possibility that the title of the county, a govern-

> mental agency, may be affected by subsequent legislation; but we shall not in this opinion pass upon questions which we deem unnecessary to this decision."

The doctrine of the *Osten* case was followed in the case of *Cascade v. Weaver,* 108 Montana 1, 90 Pacific 2d 164 (1939). In the more recent case of *Hartmann v. The City of Bozeman,* 116 Montana 392, 154 Pac. (2d) 279 (1944), the Court held:

> "It is quite evident that in enacting Chapter 63 of the Laws of 1937 the Legislature sought to preserve the lien for certain special assessments not due at the time of the execution of the tax deed. However, it is equally clear that only such installments of 'special, local improvement, irrigation and drainage assessments levied against the property' as become payable *after the execution of the tax deed* are preserved by the statute."

In that case the district was created in 1938 after the passage of the chapter above quoted. The assessments made in 1939 and a tax deed issued in December 1940.

It is clear from the language of the Court that the assessments due after the tax deed followed all such other quoted law. The law being prospective and not retroactive. In the instant case no assessments were levied after the tax deeds were filed. The land became the property of the United States in fee under the provisions of the Federal law and was not thereafter subject to taxes or irrigation assessments.

AGREED PRICE BINDING IN CONDEMNATION ACTION.

The Court found that the counties had offered their tax deed lands to the United States for fixed sums to be paid them for the acreages taken (Tr. pages 103 and 104) and the division into tracts was made by the agents of the Government for their convenience, and made this statement:

> "Where the purchase price of property has been agreed upon by the owner and the Government, and the latter should thereafter commence condemnation proceedings, the price agreed upon is still binding upon both parties. *Bank of Edenton v. United States* (4 Cir.), 152 Fed. (2d) 251-4; *Danforth v. United States,* 308 U. S. 271, 282; *Oliver v. United States,* 156 F. (2d) 281, 282;"

The following cases support our case relating to contracts entered into with the Government fixing compensation:

Muschany v. United States, 324 U. S. 49, 89 L. Ed. 744;

Danforth v. United States, 308 U. S. 271-282, 24 L. Ed. 240, 60 Supreme Court 231;

Bank of Edenton v. United States (4 Cir.), 152 Fed. (2d) 251-4;

United States v. North Carolina, 136 U. S. 211, 34 L. Ed. 336;

United States v. Rogers, 255 U. S. 163-169, 65 L. Ed. 566, 41 Supreme Court 281;

Seaboard Airline v. United States, 261 U. S. 299, 305, 67 L. Ed. 664;

Smyth v. United States, 302 U. S. 329, 82 L. Ed. 294.

THE JUDGMENT AGAINST THE UNITED STATES IS VOID.

The deposit in the registry of the Court made at the time of filing the declaration of taking was never challenged by any party herein. The executor of the Robert Henderson estate accepted the amount agreed upon by option with the United States. The counties of Dawson and Prairie stipulated with the United States as to the amounts agreed upon so that the judgment against the United States with interest from July 11, 1944 is erroneous.

The purpose of the statute Section 258a, 40 U.S. C.A., was to enable the Government to enter into immediate possession of the land condemned, save interest on the purchase price and make the purchase money available to the persons entitled thereto.

The present action was to quiet title and there has been a delay in the distribution due to service of process and completion of the title proceeding.

NO REPLY FILED BY BONDHOLDERS.

No reply was made to the answer of Dawson County by the appellees so that the matters therein are now standing as admissions of all facts well pleaded therein under the statutes of Montana, Section 9160 *Revised Codes of Montana, 1935,* and cannot now be challenged by the appellees.

Appellants' answer set up title in the United States to the lands sold by Dawson County described in the declaration of taking deposited in the registry of the

Court. That no person whomsoever, other than appellants, were entitled to the distribution of the said compensation. That the lands were free and clear of all encumbrances whatsoever and that there are no outstanding taxes against the said lands, and that the appellants are entitled to immediate distribution of the compensation deposited as the purchase price of the lands sold.

Anaconda Copper Mining Co. v. Thomas, 48 Montana 222, 137 Pacific 380 (1913).

TAX DEED EXTINGUISHES APPELLEE'S LIEN.

The appellee bondholders are in the same position as a mortgagee who loans money on lands and is compelled to pay the general taxes assessed against the lands or lose his security.

"In the case of *State ex rel. Malott v. Board of County Commissioners,* 89 Mont. 37, quoting from page 93:

'Under the provisions of section 1928, the school funds of this state may be invested "in first mortgages on good improved farm land in the State of Montana." But, if a loan is made of school funds upon farm lands, the lands are still subject to taxation, and the State of Montana is obliged to protect its loan by the payment of the taxes levied against the land, or suffer the loss of its security through the taking of a tax deed. The bondholders are in the same situation, and may protect their security by either paying the taxes or redeeming the land at any time prior to the expiration of the period for redemption.' "

DISTRIBUTION ERRONEOUS.

Conclusion No. 1 of the lower Court is a far-reaching precedent that if followed by the Court would make it possible for all prior lien holders on the tax deed lands to participate in the sale price of such lands, when sold by the counties, whereby the laws of Montana and its Supreme Court decisions the lien formerly held by such persons had been extinguished by the tax deed, a new title created and the same was declared free of all former liens or encumbrances and not subject to further assessments or levy for prior encumbrances.

Such a drastic holding should not be adopted here, as no effort was made by the bondholders to protect their security in the many ways provided by Montana law. The price agreed upon by the counties and the United States is far less than the value of the lands if sold in the usual manner as provided by the laws of Montana.

The sale procedure of the counties was taken to enable the Government to take over these lands for the purposes provided in the Federal laws pertaining to this class of lands and to re-settle farmers upon irrigated lands by new construction of projects. The record shows the total tax liability including the irrigation assessments not paid by reason of no irrigation or possibility thereof.

If the appellee bondholders had any claim to action to secure payment, it could and should have been made through the Upper Glendive-Fallon Irrigation Dis-

trict which corporation has never been legally dissolved, although not functioning as such since 1927.

CONCLUSION.

1. The judgment entered herein distributes a part of the just compensation deposited in the registry of the Court as the purchase price of lands agreed upon by the owners and the United States.

The Court took the view that appellee bondholders were entitled to all of the compensation above the general taxes which were paid to the counties in this proceeding under decisions of the Montana Supreme Court in which the Court itself stated the matter of division of the sale price of lands, sold by the counties after obtaining title thereto by tax deeds *was not before it for decision.*

The Montana Supreme Court further held the tax deeds in this state freed the lands from all prior liens including prior tax liens and that the lands were not subject to further taxation for irrigation assessments.

It is appellants' contention that such a doctrine and holding should not be followed by this Court as it establishes a precedent not warranted by law or decision, in the division of the amount received by the counties in the sale of tax deed lands to persons whose liens had been prior thereto extinguished by tax deed and who had no claims against the lands sold and hence to the funds that take the place of the lands in this action. The error is plainly that of making

a distinction between irrigation district bondholders and ordinary mortgagees or other lienholders.

2. There is in this case no equity doctrine involved as adopted and found by the Court.

All of the funds deposited represent the value of the land at the time of taking and there is no authority that allows the division of such funds to other than the owner of the lands where as here the lands have been theretofore freed of all liens and encumbrances under Montana law and Court decisions.

3. The appellees had remedies to protect their rights, under Montana law and failed to use any of them and cannot now in law or equity assert a claim to the purchase price of the lands sold to the United States where the same have been legally freed of all claims.

4. The finding of "overpayments" to the counties is erroneous in adopting a division of the lands sold by the counties to the United States which was made without the consent or knowledge or participation by the counties who by agreement sold to the United States a gross acreage for a gross sum all of which sums were due the counties without division into tracts.

It is further erroneous to add interest to the sums paid to the appellant counties as the owners of the lands taken where the purpose of the deposit of the amount of just compensation in the registry of the Court was to obtain immediate possession of the lands

and to avoid interest on the purchase price of the lands.

5. The judgment entered is further erroneous in finding for the appellee bondholders where, in the pleadings filed by them they did not deny, by reply to appellants' answer and petition for distribution, the title of appellants to the lands sold, free from encumbrance, and that such title was free from the claim of any person whomsoever and as owner of the lands appellants claimed the compensation deposited in the registry of the Court.

Appellants were and are entitled to judgment on the pleadings for the amount of the compensation deposited for their lands.

6. The findings submitted by appellants should have been adopted by the Court and judgment entered thereon under the facts of the case and the law applicable thereto.

Dated, Glendive, Montana,
February 23, 1949.

Respectfully submitted,
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